88-1880

No. .....

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

MEEKINS, INC.,
Petitioner,

VS.

LABORERS' HEALTH AND WELFARE FUND FOR SOUTHERN CALIFORNIA; CONSTRUCTION LABORERS' PENSION TRUST FOR SOUTHERN CALIFORNIA; CONSTRUCTION LABORERS' VACATION TRUST FOR SOUTHERN CALIFORNIA; LABORERS' TRAINING AND RE-TRAINING TRUST FOR SOUTHERN CALIFORNIA; FUND FOR CONSTRUCTION INDUSTRY ADVANCEMENT.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STANLEY E. TOBIN
JAMES A. BOWLES
HILL, FARRER & BURRILL
445 South Figueroa Street
35th Floor — Union Bank Bldg.
Los Angeles, California 90071
(213) 620-0460

Attorneys for Petitioner
Meekins, Inc.

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

QUESTIONS PRESENTED

1. Whether the federal courts in trust fund collection suits brought under § 301 of the Labor Management Relations Act should enforce the real collective bargaining agreement reached between an employer and a union through express oral agreement and over ten years of consistent past practice, or the pretensive agreement which was never intended to be enforced.

2. Whether an express oral agreement of an employer and a union together with over ten years of consistent past practice, reflecting the parties' intent to abrogate the written bargaining agreement, is sufficient to repudiate a pre-hire agreement under § 8(f) of the National Labor Relations Act.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on February 21, 1989.

Citations to Opinions Below

The Minute Order and Findings of Fact and Conclusions of Law of the United States District Court for the Central District of California (CV 85-4972 MRP) printed in Appendix A, *infra,* were not officially reported. The Memorandum Opinion of the United States Court of

Appeals for the Ninth Circuit, printed in Appendix B, *infra,* was not officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 21, 1981, Appendix B, *infra.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The United States statutes involved are Section 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132, 88 Stat. 891; Section 306(a) of the Multi-employer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1145, 94 Stat. 1208; Sections 301 and 302(c)(5) of the Labor Management Relations Act, 1947, 29 U.S.C. §§ 185, 186(c)(5), 61 Stat. 156, 157; Section 8(f) of the National Labor Relations Act, as amended, 73 Stat. 545, 29 U.S.C. § 158(f). These statutory provisions are set forth in Appendix C, *infra.*

STATEMENT OF THE CASE

This petition seeks review of the judgment of the United States Court of Appeals for the Ninth Circuit upholding an order of a district court in a breach of contract and collection action brought by Respondents, five jointly administered multi-employer trust funds, compelling the payment of fringe benefit contributions by Petitioner.

The jurisdiction of the district court was invoked under Section 502 of the Employee Retirement Income Security Act, Section 306(a) of the Multi-employer Pension Plan Amendments Act (which grant jurisdiction over suits for unpaid fringe benefit contributions), and Section 301 of

the Labor Management Relations Act (which grants jurisdiction over suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce).

Petitioner, Meekins, Inc. (herein "Meekins" or "Employer"), is primarily engaged in performing work as a small residential pipeline contractor.[1] Petitioner is owned and operated by the Meekins family. Petitioner only bids for jobs in the non-union market, and bases its bids on its actual labor costs. Petitioner does not represent itself to be a union signatory contractor to its customers or the public. In 1973, Petitioner executed its first Short Form collective bargaining agreement with the Laborers Union ("Union"). Thereafter, Petitioner executed subsequent Short Form Agreements with the Union. The Short Form Agreements bind an employer to a Master Labor Agreement ("MLA") which sets forth the wages, hours, working conditions and fringe benefit contributions to the bargaining unit employees.

With the knowledge and agreement of representatives of the Union, Petitioner did not follow the terms of the Short Form and MLA, during the period 1973 to 1983. Meekins family members and other employees performed laborers' work, covered by the Short Form and MLA, but they never joined the Union. Petitioner never utilized the Union hiring hall for dispatch of employees, as required by the collective bargaining agreement. Petitioner paid the appropriate wage rates and fringe benefit contributions only if it hired a Union member or if one of its employees joined the Union. The vast majority of Petitioner's laborers were not Union members, and the Union

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[1]The facts set forth herein are undisputed, based upon the unrebutted testimony of Petitioner's Vice President Charles Meekins, and shareholder, Larry Meekins. The district court found "the factual setting of this is almost without dispute."

never achieved majority status among the Petitioner's workforce.

During this 1973 and 1983 period, Petitioner's Vice President, Charles Meekins, had several conversations with a representative of the Union, Kenny Bell, during which they agreed that not all of Petitioner's employees performing laborer's work would be required to work under the terms of the Short Form and MLA. Bell and Meekins agreed that only three or four of Petitioner's employees would be "union laborers" subject to the Short Form and MLA. This understanding and agreement was renewed each time Petitioner and the Union signed a new Short Form Agreement. Bell and Meekins reached this accord in order to allow Petitioner to remain competitive in its predominantly non-union market.

Bell also instructed Meekins to call him to deal with any jobsite problems which might arise with other Laborers Union locals when Petitioner was working outside the jurisdiction of the Riverside Union. On occasion when a Union business agent visited one of Petitioner's jobsites, Petitioner's representatives told the Union officials to call Kenny Bell, and the problems were resolved.

Bell and other Union representatives visited Petitioner's jobsites several times and were informed by Larry Meekins that not all of the Petitioner's crews were Union members working under the Short Form and MLA, and they took no action.

Respondents, Trusts, audited Petitioner and demanded payment of $17,062.98 in 1982. Charles Meekins discussed the audit with Bell and specifically objected to an assessment for Mike Meekins, who was no longer a union member. Thereafter, Petitioner received an adjusted audit for $6,924.00 which Petitioner paid.

During negotiations for the 1983-1986 Short Form Agreement, Petitioner's Vice President, Charles Meekins, met with Kenny Bell, the representative of the Union, and Bob Dye, a representative for Local 12 of the Operating Engineers. They wanted Meekins to sign agreements with their respective unions, and he refused. Meekins explained that Petitioner could not be competitive if it was signatory to the union agreements, and that he would not sign with Local 12, particularly, because of its lawsuit then pending against Petitioner. A few days later, Meekins advised Bell that Petitioner would not sign an agreement with Local 12 under any circumstances. Bell assured Meekins that the past practices and agreements of the Union and Petitioner would continue. Subsequently, Meekins met with Bell and John Smith, another Union representative, at the Union offices, and reminded them that he was not signing with Local 12. Based on the Union's assurances that the past agreements and practices would continue, Meekins did execute the Laborers' Short Form Agreement.

During early 1984, Respondent Trusts audited Petitioner for the period November 1983 through November 1984, and based upon the audit assessed Petitioner for $83,221.63 in unpaid fringe benefit contributions and $16,667.42 in liquidated damages. Respondents filed suit against Petitioner in district court on July 29, 1985. In their suit, Respondents contended that Petitioner was obligated to pay fringe benefit contributions for all employees performing laborers' work. Petitioner defended based upon its agreement and past practice with the Union that only a couple of union members would be covered by the terms of the Short Form and MLA.

After a trial on the merits, the district court ruled that Petitioner could not avail itself of the oral modification of the written Master Labor Agreements and that Peti-

tioner's conduct and conversations with the Union were insufficient to put the Union on notice of Petitioner's intention to terminate the collective bargaining agreement prior to December 20, 1984 (Appendix A, *infra*). The district court's comments during oral argument after the trial reveal that the lower court was troubled by the result it felt compelled to reach based upon the law in the Ninth Circuit. The district court stated:

> "THE COURT: Well the reason I mentioned the area of the law that we are dealing with here is that in no other area of the law would this be permitted. You wouldn't permit — in any area of contract law would you permit the parties to go along interpreting the agreement and when you came to the time of the lawsuit you said it doesn't matter how you interpret the agreement. This party out here has a right to recover no matter how you interpret the agreement. There is no other area of contract law in which that is done ever.
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> * * *
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> There are other principles that apply in situations, estoppel waiver, ratification, about half a dozen other concepts that save the defendants from paying in a situation where both the parties have interpreted the contract all along in a particular way. Now I could make out a very good case if this were an ordinary contract case for a partial repudiation on both sides. I could make out a wonderful case.
>
> The question is what do you do when you have clear partial repudiation on both sides. Does that mean that the fund losses? [sic]
>
> MR. ADKINS [Trusts Counsel]: Well, my response to that is no given the status of the law in this circuit, your Honor, even as hard as that may sound.

THE COURT: Well, it sounds pretty hard; doesn't it?

* * *

THE COURT: Let me put it a different way. The way it strikes the Court is you have got the policy on your side and he has the reality on his and that is what this whole case comes down to. There was never any intention whatsoever on the part of any union to enforce this agreement against them. They had no intention of paying the money either. On both sides you have got parties who said we are willing to adhere to it for about 3 employees or four and the rest of them are members of the family and they are not ever going to do anything about being union members, don't intend to and don't intend to pay any fund and we don't intend to be bound by it. I appreciate the fact that the fund is sitting out there with a bunch of actuaries and accountants and auditors and so on and they come in and want to enforce it. It is a hard case. This is as bad as the lie case.[2] You see I have never had it said to me just this way but this is the argument you have to meet. How do you determine there has been a repudiation by a total breach of the agreement on both sides except for four employees? Now in ordinary contract law I would say that isn't called repudiation, that it is called interpreting the agreement. That presents a big problem for me. I am not saying you are going to lose and he is going to win and vice versa.

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[2]The district court was referring to *Southwest Administrators v. Rozay's Transfer*, 791 F.2d 769 (9th Cir. 1986), *cert. denied* 479 U.S. 1065 (1987).

I am just telling you as I have been sitting here listening to this testimony the factual setting of this is almost without dispute.

MR. ADKINS: That's correct.

THE COURT: The question is lawyers and judges are slot people. They have to put facts in a slot that has a name on it. Otherwise when it goes up to Appellate Court or when we were talking about it we can't explain exactly what was the rationale of the decision and so when he got up I was going to say to him there has been no repudiation of this agreement. It is still in writing and I share with you your attitude. However, the argument certainly can be made that if there has ever been a case of total interpretation of the agrement and the interpretation of the agreement being partial repudiation, this is it. I don't know exactly where that leaves us." (Trial Transcript 101-105).

Despite its above-stated reservations, the lower court ruled in favor of Respondents. The Court of Appeals upheld the district court's finding that the written Short Form and MLA were controlling despite the undisputed evidence of a contrary agreement and longstanding past practice of the Union and Petitioner. The appeals court also affirmed the lower court's determination that Petitioner's practice of applying the written collective bargaining agreement to only three or four of employees, which was agreed to by the Union, was insufficient to repudiate the written collective bargaining agreement.

REASONS FOR GRANTING THE WRIT

This case brings before the COURT two unanswered and important questions, the first arising out of an apparent clash between the national labor relations policies

enunciated in § 301 of the Labor Management Relations Act and § 302(c)(5) of the LMRA. On this question there exists a conflict between circuits.

The second question this case raises — what specific acts constitute repudiation of a prehire agreement authorized by § 8(f) of the LMRA — was specifically left undecided by this Court in *Jim McNeff, Inc. v. Todd,* 461 U.S. 260 (1983).

I.

The Court of Appeals' Refusal to Recognize The Viability of an Undenied Oral Agreement And Consistent Past Practices That Were Intended By The Parties to Supersede The Written Bargaining Agreement is in Direct Conflict With Applicable Decisions of Other Circuits and With National Labor Policies as Expressed in § 301 Of the LMRA.

The court below erroneously held that in a trust fund collection action it must enforce a written collective bargaining agreement that the parties themselves intended should not be enforced. It based this ruling upon its assumption that the employer's defense is bottomed upon alleged misrepresentations made to the employer at the time it signed a Short Form Agreement. It concluded that any such misrepresentations constitute fraud in the inducement and not in the execution, and thus "is not a legitimate defense to [a] trust fund's action to recover delinquent contributions."

Assuming, arguendo, that this is a correct legal proposition,[3] nonetheless the court wholly misplaced the Peti-

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[3]This court has not affirmed such a doctrine; indeed, it has indicated otherwise and has asserted that third party beneficiaries in trust collection actions are, as the trustees here, "subject to the

tioner's principal argument and the crux of the issue in this case. On the record before the court, the gravamen of the controversy is not fraud — of any kind — between the Employer and the Union. As to those parties, there was no misrepresentation or ambiguity as to what binding commitments each made to the other, and were or were not the operative terms of their bargaining agreement.[4] Though the trial court and the court below, and at times the parties themselves, framed the issue as one involving fraud, it is, rather, plainly one of ascertaining what is the binding agreement — the real or the pretensive one.

The rights of the trust are based upon a *binding* collective bargaining agreement between the employer and the union. See *Carpenters Southern Cal. Admin. Corp. v. Russell,* 726 F.2d 1410, 1413 (9th Cir. 1984). The trust's ability to collect contributions is limited to that which evidences the real, mutual intent of the parties and not simply to the unambiguous language of the written agreement. Collective bargaining agreements, as this Court in *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578 (1960), long ago established, must be understood in the context of the history of the negotiations, and their understanding is not to be confined to the "express provisions of the contract." See also, *Communi-*

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contract defenses of non-performing promissors." *Kaiser Steel Corp. v. Mullins,* 555 U.S. 72, 83 n.8, 87-88 (1982).

[4]Petitioner was not properly advised by the Laborers' Union that the 1983 Short Form Agreement required it to use subcontractors signatory to agreements with other unions such as the Operating Engineers. This, however, was not the assumed fraud which the court below concerned itself with or based its decision upon, nor what is chiefly involved in this case: the repeated oral understanding (not misunderstandings) of the Laborers' Union (through Bell) and the Employer (through Meekins) whereby they reaffirmed that the contract's written terms were to apply only to a limited number of laborer employees.

cations Workers of America v. Pacific Northwest Bell Telephone Co., 334 F.2d 455, 459 (9th Cir. 1964). ("If the true intent of the parties is to remain our concern, it would seem important that we not be required to close our eyes to all but the uncertain writing itself.")

This is especially so when, as here, the evidence is both overwhelming and undisputed that the parties deliberately executed a written contract which was intended to be pretensive and was not meant to express their real intent. They intended their written contract to be merely a matter of form, not substance. The real contract was both an oral one and one of practice. The Employer reiterated, for ten years running, and when entering into and renewing the agreement four times, that it could not afford to abide by and would not be bound to any agreement which required it to adhere to the standard union wages, hours, and working conditions for any more than three or four of its employees; and, in signing the agreements, it would only be bound by the written contract to that limited extent. That the Union understood this to constitute the operative bargaining relationship is equally plain and undisputed. The Union undoubtedly found adequate consideration for this limited type of agreement.[5]

The court below recognized that not only did both parties understand the nature and scope of their real agreement, but they acted in accordance with that understanding. Thus, the Employer bid exclusively on non-

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[5]In light of the fact that in the Southern California area, Union contractors' market share of the residential dollar dropped from 58% in 1977 to 22.4% in 1984, the Union here was probably quite satisfied with being able to have at least a few of its members employed on the Meekins' projects. See, Construction Industry Research Bd.: *A Survey of the Construction Industry: Trends in the Eleven County Southern California Region,* p. 24 (Jan. 1983), and *Data Base Update: Southern California Contract Awards,* p. 2 (Sept. 1985).

union jobs; it never called the Union's hiring hall to obtain personnel; the two primary principals of the Employer, as well as many of its employees, performed work covered under the written agreements but never joined the local union; and the Union's representative, in several conversations during that period, reiterated that he would not require all Meekins' employees performing work covered under the agreement to join the local union so that Meekins could remain competitive. In addition, there were conversations with the Union's representative, Bell, in which Bell told the Employer how to deal with jobsite problems that might arise with other Laborers' locals outside of his jurisdiction — a patent indicia of the Union "taking care" to see to it that the Employer would not be bound to the written contract in even its most salient provisions.

That the Union had knowledge and acquiesced in this *Realpolitik* contract was further established by the fact that the union representatives who visited the Employer's jobsites knew or discovered that not all the men on the Employer's work crews belonged to the Union, and the Union took no action. Furthermore, when the Trust, after an audit covering payments presumably due prior to August 1982, sought fringe payments for a certain employee, Mike Meekins, the Employer contacted Bell, advised him that Meekins was no longer a union member and should not be included, and thereafter the Trust adjusted its audit and reduced a significant amount of money otherwise due because Mike Meekins was not in the Union. Finally, in 1983, in regard to the particular contract in question, it is undisputed that the Employer agreed to sign a renewal agreement only after it was given further assurances from the Union representative that the past practices between the company and that union would continue in the future.

Based on this undisputed evidence, the trial court made the following pungent observations:

> "THE COURT: Well, the reason I mentioned the area of the law that we are dealing with here is that in no other area of the law would this be permitted. You wouldn't permit — in any area of contract law would you permit the parties to go along interpreting the agreement and when you came to the time of the lawsuit you said it doesn't matter how you interpret the agreement. This party out here has a right to recover no matter how you interpret the agreement. There is no other area of contract law in which that is done ever . . .
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> MR. ADKINS [Trust Counsel]: That's correct, your Honor, you are absolutely right.
>
> THE COURT: Let me put it a different way. The way it strikes the Court is you have got the policy on your side and he has the reality on his and that is what this whole case comes down to. There was never any intention whatsoever on the part of any union to enforce this agreement against them. They had no intention of paying the money either. On both sides you have got parties who said we are willing to adhere to it for about 3 employees or four and the rest of them are members of the family and they are not ever going to do anything about being nonunion members, don't intend to be bound by it . . .
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> If he says to the other guy I don't care what the print says if we are just going to go along in the same way we have gone along for years and years and years I will sign it and you can go away and I will go back to the job, and the guy said okay. Now that is where we are. That might not be a rational way for lawyers to act but it is a perfectly rational way for

> people in unions, for union business agents and contractors to act."

The courts below, notwithstanding the foregoing recognition of the realities, held against the Employer. That decision is in direct conflict with those from other circuits. By miscasting this case as fraud-inspired rather than a pretensive contract, the lower courts failed to follow the applicable federal law and adhere to sound national labor policy that does not make meaningless the intent of the parties to bargaining agreements.

The Fourth Circuit in *Lewis v. Lowry*, 295 F.2d 197 (1961), *cert. denied*, 368 U.S. 977 (1962), was confronted with facts indistinguishable from the instant ones. There, exactly as here, the employer asserted to the union representative before signing any agreement that it could not afford to make trust payments or pay the union wage scale. Because of this, the union and the employer reached a "clear understanding" that the company would not be bound by the written contract ("a mere formality"). Thereafter and for a number of years, with the knowledge of the union, the employer, in accordance with their understanding, failed to make such payments.

Judge Haynsworth, writing for that court, held that in an action brought by the trust to collect royalty payments, the defendant may properly show and raise as a defense that the written agreement is not sacrosanct and that the real agreement, not the written "pretensive" agreement, should be the binding one:

> "If, therefore, it should be made to appear that the union, for the sake of its relations with the larger mine operators, or for any other reason, insisted upon execution by the small operator of an agreement which in fact was pretensive and not the real agreement of the parties, nothing appears in the

> federal statutes which would prevent disclosure and proof of the real agreement between the union and the mine operator . . ." *Id.*, 295 F.2d at 199.

That court went on to declare that a trust fund does not have a greater right to enforce a pretensive agreement than would the immediate parties to it:

> "The trustees are the third party beneficiaries of the real agreement between the union and operator, which they may enforce in accordance with its terms, but the fact that the suit is brought for the benefit of the third party beneficiaries would not foreclose a defense that there was no contract or that the writing upon which the complaint is based is not, in fact, the real agreement between the operator and the union." *Ibid.*

The decision of that court that the "right to recover contributions from [the employer] is dependent entirely upon the real agreement between [it] and the union" remains the law in that circuit and seemingly in others as well.[6]

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[6]In addition to *Lewis v. Mears* and *Robbins v. Lynch, infra,* other circuit courts of appeal cases support the doctrine as enunciated in *Lewis v. Lowry.* See *Food Handlers Local 425 v. Valmac Industries, Inc.*, 528 F.2d 217, 219 (8th Cir. 1975); *Lewis v. Owens,* 338 F.2d 740, 741-42 (6th Cir. 1965). See also. *Wilkes Barre Printing Pressmen v. Great Northern Press,* 522 F.Supp. 106, 109-110 (D.C., M.D., Penn. 1981); *Warehousemen's Health and Welfare Fund v. IT Corp.*, 524 F.Supp. 96 (C.D. Cal. 1981); *Brickmasons Pension Trust v. K. Pullen Co.*, 99 Labor Cases ¶ 10730 (CCH) (C.D. Cal. 1983).

Lewis v. Lowry arose again following trial in the district court, wherein judgment was entered for the trust fund. The Court of Appeals, adhering to its prior position, upheld the district court on the basis that the evidence on behalf of the defendant did not adequately reach that degree of proof so as to set aside the written agreement. *Lewis v. Lowry,* 332 F.2d 453, 456 (4th Cir. 1963).

In a related type of case, *Lewis v. Mears,* 297 F.2d 101 (3rd Cir. 1961), the owner, a signatory to a number of agreements with the union, testified that the union had agreed that the contracts could not become effective until a copy signed by the union was returned to the company. Since, it was asserted, no such executed copy was returned, this defense was effective as against the trust in its action brought for payments allegedly due to it. Subsequently, in another case from the Third Circuit, *Huge v. Long's Hauling Co., Inc.,* 590 F.2d 457 (3rd Cir. 1978), Judge Adams, in a concurring opinion, cited a number of cases wherein courts have disallowed defenses against third party trusts that might otherwise be effective, if brought against one or the other party to the agreement. In distinguishing the decisions of the court in *Lewis v. Lowry* and *Lewis v. Mears, supra,* Judge Adams set forth a rationale why the courts in these latter cases acted properly:

> "... whereas it is reasonable to demand in other circumstances that the employer initiate suit if it wishes to be absolved from liability, it is unreasonable to expect that it do where it believes that both it and the union had no intent to create a binding agreement. In the latter situation, the employer should not be expected to know that a potential adversary exists or that it is jeopardizing the expectations of its employees." *Huge, supra,* 590 F.2d at 464 n.8.

See also, Note, "Denying the Illegality Defense: An Enigmatic Approach to the Delinquent Pension Fund Contribution Problem," 34 *Stan. Law Rev.* 221, 231 (1981).[7]

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[7]Similarly, in *Robbins v. Lynch,* 836 F.2d 330 (7th Cir. 1988), an action brought by the trust for collection of delinquent contributions, the defendant argued that not only had he never signed the agreement, but that he had not intended to be bound by it. Nontheless,

Most of the cases that deny employers the right to raise otherwise valid defenses in actions brought by trust funds rest upon the rationale that such defenses, often involving fraud, enable union officials to be compromised and in some way bring about "shakedowns and kickbacks." In addition, trust beneficiaries, employees who may otherwise expect to receive pension and health and welfare payments, may find to their surprise they are not covered. However, not only are there sound reasons for protecting the employer in the instant type of case, as pointed out by Judge Adams in *Huge v. Long's Hauling Co., Inc., supra*, but the rationale for disallowing such a defense hardly lies in these circumstances. Here, there could never be any question among the non-union employees as to whether they were covered by a union agreement; they surely knew they were not. They were not members of the union; they were not paid union wages; they did not work on union jobs; and they received none of the union benefits for at least a decade. The defense raised by Meekins here is akin to asserting that no collective bargaining agreement exists. Accordingly, as the court noted in *Operating Engineers Trust Fund v. Gilliam*, 737 F.2d 1501, 1503 (9th Cir. 1984), in a similar situation, "no potential trust beneficiary can be injured or misled by the employer's claim that he never intended to enter into a collective bargaining agreement." Furthermore, if any-

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because he had adhered to the agreement in all particulars, had paid some trust fund contributions, and had not made known his intention to the union, the court held that his defense, not having been effectively communicated to the union, was of no effect. Interestingly, however, the court did indicate that, as in a pretensive agreement, "The parties are free to sign hortatory as well as binding documents; 'intent' is important in the sense that if the parties agree on a hortatory instrument the court may not convert it into a different kind." *Id.*, 836 F.2d at 332. Had Lynch made his intent known to the union and had the union agreed, the result would likely have been different.

thing, the Trusts did benefit; they received some fringe benefit contributions for union member employees. Absent the *real* agreement, they likely would have received none.

This case brings into sharp focus a conflict between § 301 and § 302 of the LMRA. Under § 301 oral agreements, bargaining history and past practices are consistently used by courts and arbitrators to develop the collective bargaining relationship of labor and management. The "law of the shop" is necessarily flexible and is not governed by formal written agreements. The concerns that § 302(c)(5) addresses are to assure that employee benefit funds and their beneficiaries are not defrauded; written instruments assist in avoiding certain forms of abuse. The facts in this case, however, weigh heavily in favor of the flexibility factor fostered under § 301, because no fraud against the Trusts or beneficiaries occurred or is likely to occur. By granting review, the Court will aid in resolving the inherent conflict that exists between these two important federal labor statutes that bear upon this case. This dichotomy is highlighted by the decisions of the lower courts herein versus, in particular the decision of the court in *Lewis v. Lowry, supra.*

II.

This Court Should Resolve The Issue Left Open in McNeff v. Todd and Decide What Conduct Is Sufficient to Repudiate a Pre-Hire Collective Bargaining Agreement.

A similar tension exists between the requirement of written agreements under LMRA § 302(c)(5) and the repudiation by oral statements or conduct of such written pre-hire agreements allowed under § 8(f) of the NLRA. This case presents the important and recurring issue of

whether oral statements and conduct of an employer and a union are sufficient to repudiate a pre-hire collective bargaining agreement.

This Court left open the issue of what acts by an employer are sufficient to effect a repudiation of a Section 8(f) pre-hire agreement in *McNeff, supra,* 461 U.S. at 271 n.11. The Court stated:

> "It is not necessary to decide in this case what specific acts would effect a repudiation of a pre-hire agreement — sending notice to the union, engaging in activity overtly and completely inconsistent with contractual obligations, or, as respondents suggest, precipitating a representation election pursuant to the final proviso in § 8(f) that shows the union does not enjoy majority support." *Ibid.*

In the instant case, the Court of Appeals erred by holding that Petitioner had not repudiated the written Short Form Agreement and MLA. That Court acknowledged that Petitioner put the Union on notice that it would not apply the written collective bargaining agreement to all of ~~its laborer~~ employees at the time it signed the Short Form agreement. The appeals court speciously reasoned that "The basis for signing the agreement cannot also be considered to have put the union on notice that Meekins repudiated the agreement."

What occurred in the case at bar is that both sides, Petitioner and the Union, repudiated the written Short Form and MLA. During oral argument, the district court posed this intriguing issue as follows: "*The question is what do you do when you have clear repudiation on both sides. Does that mean that the fund losses* (sic)?" (Emphasis added.) Here both parties to the written agreement repudiated it, and substituted a different agreement through negotiation and consistent past practice. Peti-

tioner and the Union agreed that only three or four of Petitioner's employees would be covered by the terms of the written collective bargaining agreement. They lived with this agreed upon arrangement for over ten years. There can be no more forthright repudiation of a collective bargaining agreement than its renunciation by both parties to the agreement.

The Ninth Circuit acknowledged in this case that "an employer's refusal to comply with any terms of the pre-hire agreement coupled with failure to utilize any of the benefits of the agreement [is] sufficient notice of its intent to repudiate," *citing International Brotherhood of Electrical Workers v. KBR Electric*, 812 F.2d 495, 498 (9th Cir. 1987); *United Brotherhood of Carpenters v. Endicott Enterprises, Inc.*, 806 F.2d 918, 923 (9th Cir. 1986), *cert. denied*, 108 S.Ct. 151 (1987). The Court of Appeals concluded, however, that because Petitioner partially satisifed the terms of the Short Form and MLA, by applying them to three or four employees, there was no repudiation of the written collective bargaining agreements.[8]

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[8]Because the appeals court ruled that Petitioner's conduct was not sufficient to constitute a repudiation, it did not reach the issue of whether the repudiation was timely. In *Mesa Verde Construction v. Northern California District Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (en banc), a dividend Ninth Circuit adopted the NLRB's decision in *John Deklewa*, 282 NLRB 184 (1987), *enforced sub nom. International Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), *cert. denied*, 109 S.Ct. 222 (1988), and ruled that a pre-hire collective bargaining agreement "may not be unilaterally repudiated . . . prior to its termination or absent an election among the appropriate bargaining unit's employees to reject the union." 861 F.2d at 1137. The four dissenting judges in *Mesa Verde* were of the opinion that the NLRB's *Deklewa* rule was contrary to this Court's decisions in *McNeff, supra*, and *NLRB v. Local Union No. 103, International Association of Bridge, Structural & Ornamental Iron Workers*, 434 U.S.

This ruling is contrary to the Ninth Circuit's own decision in *Endicott, supra*, where it held that if "neither party treated the pre-hire agreement as if it were still in effect . . . a trier of fact could not reasonably find that there had been no repudiation." *Id.* 806 F.2d at 923. Here, Petitioner and the Union agreed from the outset in 1973 that the Short Form and underlying MLA would be repudiated and supplanted by a different agreement, which did not require all of Petitioner's employees to be paid union wages and benefits. This express repudiation of the Short Form and MLA was restated when Petitioner signed the 1983 Short Form Agreement. The conduct of the parties over a ten year period, reinforced this express repudiation of the Short Form and MLA. As the Court of Appeals found herein, "admittedly, Meekins, like *Endicott* and *KBR*, did not attempt to utilize the benefits that accrued from signing the pre-hire agreement. With one exception, Meekins never bid on any union jobs nor did it rely on Local 1184 to supply it with subcontractors or workers." Unlike *McNeff, supra*, 461 U.S. at 270, Petitioner did *not* accept the benefits of the pre-hire agreement nor mislead the Union of its true intention never to fulfill its contractual obligations. Rather, Petitioner expressly repudiated the Short Form and MLA and entered into a different agreement with the Union. Petitioner lived up to its agreement with the Union.

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335 (1978), which allowed unilateral repudiation at any time, even during the term of a pre-hire agreement.

The instant case involves repudiation by *both* the Employer and the Union, which occurred consistently at the inception, conclusion and continuously during the pre- hire agreements, and hence under either the *Deklewa* or *McNeff* rule, the repudiation was timely and proper. However, this Court may wish to grant review to clarify the unsettled issue of when (as well as how) repudiation or a pre-hire agreement may be accomplished.

This conduct together with the express agreement of the parties that the Short Form Agreement and MLA would not be followed should be sufficient to constitute a repudiation of the Short Form Agreement and MLA. There can be no question that the Union was on notice of the Employer's intent to repudiate to those agreements. Indeed, the Union acquiesced and agreed to this repudiation. This Court's *McNeff* decision strongly suggests that all that is necessary for repudiation for a pre-hire agreement is employer conduct or statements sufficient to put the Union on notice that the agreement has been repudiated. Here, Petitioner clearly and unequivocally "manifested an intention to void or repudiate" the Short Form Agreement and MLA. *McNeff, supra,* 461 U.S. at 270.

As in the conflict between LMRA § 301 and § 302(c)(5) discussed in Section I, *supra*, there is a tension between the § 302(c)(5) requirement of a written agreement and the trend under NLRA § 8(f) of allowing repudiation of pre-hire agreements by oral statements or conduct. Review should be granted by this Court to reconcile these competing federal labor statutes.

This Court should grant certiorari to correct the erroneous decision of the Court of Appeals and clarify the standard as to what types of statements or conduct by an employer (and a union) are sufficient to constitute repudiation under the *McNeff* rule.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

STANLEY E. TOBIN
JAMES A. BOWLES
HILL, FARRER & BURRILL

Attorneys for Petitioner,
Meekins, Inc.

APPENDIX A

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. CV-85-4972-MRP Date 10/30/87

LABORERS HEALTH & WELFARE FUND FOR SOUTHERN CA. v. MEEKINS INC.

Docket Entry

Present: Hon. Mariana R. Pfaelzer, Judge
Robert J. Flores, Deputy Clerk
Beth E. Culbertson, Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
N/A

ATTORNEYS PRESENT FOR DEFENDANTS:
N/A

PROCEEDINGS:

The Court, having considered the evidence and the legal authorities cited to it by the parties, in particular *United Brotherhood of Carpenters, etc. v. Endicott Enterprises, Inc.*, 806 F.2d 918 (9th Cir. 1986), and *IBEW v. KBR Electric*, 812 F.2d 498 (9th Cir. 1987), finds for the plaintiffs. The Court does not find that defendant's shareholders, officers and agents, acting on behalf of defendant, engaged in conduct so overtly inconsistent with its obligations under the collective bargaining agreement that it was sufficient to put the union on notice of defendant's intention to terminate the agreement prior to December 20, 1984. Some acts of defendant's shareholders, officers and representatives could in fact be construed as a confirmation of defendant's contractual obligations. At most, it appears that the union and the defendant attempted to orally modify, rather than termi-

nate, the agreement. Oral modification of such an agreement is legally unavailing against the plaintiff funds. In sum, the selective compliance with the agreement which appears here is not sufficient to put the union on notice of defendant's intent that the agreement was terminated.

Counsel for plaintiffs are to revise their previously proposed findings of fact and conclusions of law in light of this ruling and the evidence presented, and submit to the Court a new set of findings and conclusions and a form of judgment within twenty days of the date of this ruling. Counsel for defendant shall have ten days thereafter to submit to the Court its objections to the proposed findings, conclusions and judgment, at which time the matter shall stand submitted.

ALLEN K. TANITA,
FRANK N. ADKINS,
Members of
GALISKY & ADKINS
3540 Wilshire Boulevard, Suite 512
Los Angeles, California 90010-2382
(213) 383-3155
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LABORERS' HEALTH AND WELFARE FUND FOR SOUTHERN CALIFORNIA; CONSTRUCTION LABORERS' PENSION TRUST FOR SOUTHERN CALIFORNIA; CONSTRUCTION LABORERS' VACATION TRUST FOR SOUTHERN CALIFORNIA; LABORERS' TRAINING AND RE-TRAINING TRUST FOR SOUTHERN CALIFORNIA; FUND FOR CONSTRUCTION INDUSTRY ADVANCEMENT;
Plaintiffs,

vs.

MEEKINS, INC., a California Corporation,
Defendant.

CASE NUMBER CV 85-4972 MRP (JRx)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[LOCAL RULE 13.5]

The above-entitled action came on regularly for trial on October 6, 1987 before the Honorable Mariana R. Pfaelzer, United States District Judge, sitting without a jury. Frank N. Adkins and Allen K. Tanita appeared as counsel for Plaintiffs, and Wilson Clark and Walter C. Appling appeared as counsel for the Defendant. The trial

was conducted pursuant to the Pre-Trial Conference Order, the Stipulations of the parties at trial, the testimony and documentary evidence introduced at trial, and the oral arguments of counsel. The cause having been submitted to the Court for decision, the Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiffs, LABORERS' HEALTH AND WELFARE FUND FOR SOUTHERN CALIFORNIA, CONSTRUCTION LABORERS' PENSION TRUST FOR SOUTHERN CALIFORNIA, CONSTRUCTION LABORERS' VACATION TRUST FOR SOUTHERN CALIFORNIA, LABORERS' TRAINING AND RETRAINING TRUST FOR SOUTHERN CALIFORNIA, and FUND FOR CONSTRUCTION INDUSTRY ADVANCEMENT are express trusts created by written Agreements and Declarations of Trust, and existing pursuant to Section 302 of the Labor Management Relations Act of 1947, as amended [29 U.S.C. Section 186], and the Employee Retirement Security Act of 1974, as amended, [29 U.S.C. Section 1000 *et seq.*].

2. The SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS AND AFFILIATED LOCAL UNIONS (hereinafter referred to as the "DISTRICT COUNCIL"), are labor organizations within the meaning of 29 U.S.C. § 185.

3. Defendant MEEKINS, INC. is a California corporation engaged in the construction industry in an industry affecting commerce within the meaning of the aforementioned Labor Management Relations Act, within the geographic jurisdiction of this Court.

4. On or about October 17, 1973, again on or about December 12, 1974, again on or about March 29, 1978,

again on or about August 18, 1980, and again on or about November 1, 1983, Defendant MEEKINS, INC. entered into "short-form" collective bargaining agreements with the DISTRICT COUNCIL.

5. The terms of the "short-form" collective bargaining agreements, referred to in paragraph 4 above, require signatory contractors to be bound to the terms and conditions of the contemporaneous Master Labor Agreement between the DISTRICT COUNCIL and the ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., et al., and the Declarations and Agreements of Trust establishing the Plaintiff Trust Funds.

6. Defendent MEEKINS, INC., during the period from November 1, 1983 through November 31, 1984, employed workmen who performed labor within the covered categories of the 1980-83 "short-form" collective bargaining agreement and the 1980-83 Master Labor Agreement. The individuals who performed such labor were:

(1) E. Bowe	ss# 492-50-0360
(2) L. Frias	ss# 558-42-7851
(3) M. Meekins	ss# 557-96-1185
(4) D. Meekins	ss#
(5) D. Meekins	ss#
(6) G. Meekins	ss#
(7) W. Meekins	ss#
(8) K. Tonissen	ss#
(9) G. Taja	ss#
(10) J. Taranto	ss#
(11) T. Hinojosa	ss# 563-38-6109
(12) R. Honojose	ss#
(13) J. Meekins	who is the same person as #3, M. Meekins

7. During the early part of 1985, the Plaintiff Trust Funds audited the payroll and related records of Defendant MEEKINS, INC., for the period from November 1, 1983 through November 31, 1984. The audit revealed that MEEKINS, INC. did not report to the Trust Funds each and every hour worked by the employees in paragraph 6, above, that a total of 10,443 hours were unreported and unpaid.

8. The applicable fringe benefit rate of laborers' hours from November of 1983 through November of 1984 was $7.81 per hour.

9. On December 20, 1984, Wilson Clark, counsel for Defendant MEEKINS, INC., sent to the DISTRICT COUNCIL a letter purporting to repudiate any collective bargaining agreements between MEEKINS, INC. and the DISTRICT COUNCIL.

10. The Court does not find that Defendant's shareholders, officers and agents, acting on behalf of Defendant, engages in conduct so overtly inconsistent with its obligations under the collective bargaining agreement that it was sufficient to put the Union on notice of Defendant's intention to terminate the agreement prior to December 20, 1984.

11. Some acts of Defendant's shareholders, officers and representatives could in fact be construed as a confirmation of Defendant's contractural obligations. At most, it appears that the Union and the Defendant attempted to orally modify, rather than terminate, the agreement. Oral modification of such an agreement is leglaly unavailing against the Plaintiff Trust Funds. In sum, the selective compliance with the agreement which appears here is not sufficient to put the Union on notice of Defendant's intent that the agreement was terminated.

12. Defendant MEEKINS, INC. did not repudiate any collective bargaining agreement between itself and the DISTRICT COUNCIL prior to December 20, 1984. This Court need not address whether any repudiation took place after December 20, 1984.

13. Judgment is granted for Plaintiffs and against Defendant:

(a) for fringe benefit contributions in the amount of $83,221.63;

(b) for liquidated damages for failure to pay fringe benefit contributions in the amount of $16,667.42;

(c) for interest on the unpaid fringe benefit contributions in the amount of $25,365.00;

(d) for Plaintiffs' audit costs in the amount of $300.00;

(e) for Plaintiffs' court costs incurred in this suit;

(f) for Plaintiffs' attorneys' fees incurred in this suit in the sum of $6,111.08.

CONCLUSIONS OF LAW

14. The Court, having considered the evidence and the legal authorities cited to it by the parties, in particular *United Brotherhood of Carpenters, etc. v. Endicott Enterprises, Inc.*, 806 F.2d 918 (9th Cir. 1986), and *IBEW v.*

KBR Electric, 812 F.2d 498 (9th Cir. 1987), finds for the Plaintiffs.

DATED: December 4, 1987

MARIANA R. PFAELZER,

MARIANA R. PFAELZER,
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA

APPENDIX B

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LABORER'S HEALTH AND WELFARE FUND FOR SOUTHERN CALIFORNIA; CONSTRUCTION LABORER'S PENSION TRUST FOR SOUTHERN CALIFORNIA, ET AL.,
Plaintiffs-Appellees,

v.

MEEKINS, INC.,
Defendant-Appellant.

No. 88-5585
D.C. No. CV-85-4972-MRP

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted December 5, 1988
Pasadena, California

Before: Hall, Wiggins, and Thompson, Circuit Judges

The Plaintiff trust funds (Funds) brought this action under section 502 of the Employee Retirement Income Security Act or 1974 (ERISA), 29 U.S.C. § 1132 (1982), and section 301 of the Labor Management Relations Act (LMRA), 19 U.S.C. § 185 (1982), to collect allegedly delinquent fringe benefit contributions from Meekins, Inc. (Meekins). Following a one-day bench trial, the district court ruled in favor of the Funds and ordered that

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Meekins pay the Funds a total of $152,554.05 in delinquent contributions plus interest, costs, and attorney fees. On appeal, Meekins contends it should not be bound by the applicable collective bargaining agreement, which requires it to make contributions to the Funds based on the defense of "fraud in the execution," and also because it repudiated the collective bargaining agreement prior to the dates for which the Funds seek to collect the fringe benefit contributions. We affirm.

BACKGROUND

Meekins is engaged in the business of laying pipeline, and first began doing business in 1973. In October 1973, Meekins entered into a "short form" collective bargaining agreement (short form agreement) with Local 1184 of the Southern California District Council of Laborers and Affiliated Local Unions (District Council). Under the terms of the short form agreement, Meekins was bound to the conditions of the Master Labor Agreement (Master Agreement) between the District Council and the Associated General Contractors of California, Inc., and the "Declarations and Agreements of Trust" (Declarations) which established the Funds. The terms of the short form agreement, in conjunction with the Master Agreement and Declarations, required Meekins to pay fringe benefit contributions on an hourly basis for employees performing labor within the covered categories of the short form agreement. Meekins signed short form agreements similar to the 1973 agreement on December 12, 1974, March 29, 1978, August 18, 1980, and November 1, 1983.

Despite the fact that Meekins entered into the short form agreements, it bid exclusively on nonunion jobs. Meekins never called the District Council hiring hall for the dispatching of personnel. According to the undis-

puted testimony of both Charles and Larry Meekins, Sr., two of the primary principals of Meekins, they, as well as many of their employees, performed work covered under the short form agreements but never joined Local 1184. Throughout the 1973-1983 period, several conversations took place between Larry Meekins and Mr. Bell, a representative of Local 1184, in which Bell agreed not to require all Meekins's employees performing work covered under the short form agreements to join Local 1184 so that Meekins could remain competitive. In order to keep Local 1184 "happy," however, Meekins from time to time employed union laborers. If they hired a member of Local 1184 or if an employee joined Local 1184, Meekins paid the appropriate wage rates and fringe benefit contributions.

On November 29, 1984, Meekins filed an election petition with the National Labor Relations Board (NLRB) to conduct a representation election with respect to "All General Construction and Cleanup Laborers and All Employees employed in the classification of Laborers." The petition was dismissed by the Regional Director of the NLRB, and Meekins has appealed the dismissal to the NLRB. On December 201, 1984, Meekins's counsel sent a letter to the District Council purporting to repudiate any collective bargaining agreements between Meekins and the District Council.

During the early part of 1985, the Funds audited the payroll and related records of Meekins for the period between November 1, 1983, and November 30, 1984,[1] and

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[1]The pretrial order and findings of fact and conclusions of law both indicate that the relevant time period of the audit as well as the period of time for which damages were awarded ended November 31, 1984. November, of course, has only 30 days; the audit period thus could have ended no later than November 30, 1984.

concluded that Meekins failed to disclose a total of 10,443 hours in which Meekins's employees had performed labor covered under the November 1, 1983, short form agreement (Short Agreement). The Funds filed this action on July 25, 1985, to collect the alleged delinquent payments, together with interest, liquidated damages, and attorney fees.

The district court concluded that Meekins's conduct was not sufficient to put Local 1184 on notice of Meekins's intention to terminate the Short Agreement and Master Agreement prior to the December 20, 1984, letter of termination. The funds were awarded a judgment in the amount stipulated to by the parties, along with costs and attorney fees. This timely appeal followed. We have jurisdiction under 28 U.S.C. § 1291 (1982).

ANALYSIS

I. *Fraud*

Meekins first contends that the district court's decision should be overturned because the terms of the contract were misrepresented to Meekins at the time the Short Agreement was signed.[2]

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[2]The Funds argue that Meekins is precluded from raising the defense of fraud because there were no allegations of fraud in any of its pleadings and the issue was not raised at trial. The defense of fraud was not raised in Meekins's answer. It was raised, however, in the pretrial order under subsections 8(a)-(c) of the section entitled "Issues of Law," and under subsection 7(c) of the section entitled "Facts to be Litigated." Additionally, Meekins's counsel elicited testimony from Charles Meekins during trial regarding Bell's alleged failure to warn Charles of the ramifications of Article V, Paragraph C of the Master Agreement, despite Bell's knowledge of Meekins's refusal to sign a short form agreement with Local 12.

A. *Standard of Review*

We review the district court's findings of fact under the clearly erroneous standard. *Southwest Adm'rs. Inc. v. Rozay's Transfer*, 791 F.2d 769, 772-73 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); Fed. R. Civ. P. 52(a). Whether the defense of fraud is available in an action to recover delinquent trust fund contributions is a question of law to be reviewed de novo. *Id.* at 773.

B. *"Fraud in the Execution" or "Fraud in the Inducement"*

Whether fraud is available as a defense in an action to recover delinquent trust fund contributions depends on the type of fraud alleged. Although fraud in the *execution* of a collective bargaining agreement may relieve an employer from having to make pension contributions required under an agreement, *see, e.g., Operating Eng'rs Pension Trust v. Gilliam*, 737 F.2d 1501, 1504-05 (9th Cir. 1984) (employer not obligated to make pension fund contributions because he had reasonably relied on the union's representation that he was signing a document of a wholly different nature), "[t]he claim that a promise to make contributions was fraudulently *induced* is not a legitimate defense to [a] trust fund's action to recover delinquent contributions," *Rozay's Transfer*, 791 F.2d at 775 (footnote and citation omitted) (emphasis added).

The distinction between fraud in the execution and fraud in the inducement was described in *Rozay's Transfer*. Fraud in the inducement "induces a party to assent to something he otherwise would not have." *Id.* at 774. Fraud in the execution "induces a party to believe the nature of his act is something entirely different than it actually is," and "arises when a party executes an agreement 'with neither knowledge nor reasonable opportunity

to obtain knowledge of its character or its essential terms.' " *Id.* (quoting U.C.C. § 305(2)(c) (1977)).

Meekins contends that the fraud perpetrated by Local 1184 was in the execution of the Short Agreement. In attempting to characterize the alleged fraud as fraud in the execution, Meekins argues that the Short Agreement and the Master Agreement do not embody the terms and conditions of the agreement that Meekins or Local 1184 intended to enter. Meekins apparently contends that the agreement between it and Local 1184 is comprised of and defined by the prior practices of the previous ten years in which Local 1184 allegedly interceded and made deals with the Funds.

Despite Meekins's somewhat clever attempt to reshape its fraud argument so that it might be construed as fraud in the execution, stripped to its essentials, Meekins's claim is a classic example of fraud in the inducement. Although Charles Meekins and the other principals of Meekins may not have seen the Master Agreement or Declaration prior to signing any of Local 1184's short form agreements, they were undoubtedly aware that the Master Agreement and Declarations required Meekins to make fringe benefit contributions on behalf of employees performing work covered under the short form agreements.[3]

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[3]Their knowledge of the contribution requirements is evidenced by their payment of contributions on behalf of its employees who belonged to Local 1184, *see e.g., Abbate v. Browning-Ferris Indus.*, 767 F.2d 52, 56 (9th Cir. 1985) (employer's payment of welfare benefit contributions would not have been paid had there not been a provision requiring such payments), and their contention on appeal that they thought Local 1184 could "intercede and make deals" with the funds. Taken together, these two factors indicate that Meekins was well aware that the Master Agreement and Declarations required the payment of fringe benefit contributions for nonunion employees performing work covered by the short forth agreements.

Meekins's argument, therefore, is essentially that it relied on Local 1184's past practice of partial enforcement of the Master Agreement, Declarations, and short form agreements, and its ability to intercede with the Funds. Characterized in this fashion, Meekins's allegations of fraud constitute fraud in the inducement. In *Rozay's Transfer* the court characterized a fraudulent promise by the union that it could get the trust fund to waive previously unpaid contributions as fraud in the inducement. *Rozay's Transfer*, 791 F.2d at 775. The court recognized that there was no confusion concerning the actual contents of the agreement, but that the misrepresentation concerned only whether the fringe benefit provisions of the agreement would be enforced. *Id.* at 774. As in *Rozay's Transfer*, the principals of Meekins were aware of the fringe benefit contribution provisions contained in the Master Agreement and Declarations. The only question was whether they would be enforced.

Meekins's attempt to characterize the alleged fraud as fraud in the execution is also fundamentally flawed because the past practices of Local 1184 and Meekins, which Meekins's claims comprise the terms to which it agreed to be bound, are nothing more than attempted oral modifications of the written agreements.[4] It is well settled in this circuit that oral representations that trust fund contribution provisions of an agreement will not be enforced are invalid. *Waggoner v. Dallaire*, 649 F.2d 1362, 1366 (9th Cir. 1981) (oral agreement between employer and union

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[4]Meekins claims that the past practices do not constitute oral modification of the agreements, but rather constitute the agreement itself. This argument, however, would require us to conclude that Meekins was totally oblivious to the fact that it signed the Short Agreement and that it knew it was aware of and that it would be bound by the provisions of the Master Agreement. As discussed above, however, the principals of Meekins were aware of the provisions of the agreements as well as their binding effect.

that trust benefit terms would not be enforced does not modify the written agreement); *Rozay's Transfer*, 791 at 775 n.3 (citing *Waggoner*).

The rule precluding oral modification of written benefit provisions is applicable to alleged modifications based on prior practices. First, there is no reason to distinguish between the two types of modifications. The alleged modification based on the prior practice of partial enforcement in this case is essentially a product of a series of oral agreements between Bell and Meekins. It would thus make little sense to distinguish between the two.

The policy reasons behind proscribing oral modifications to written agreements likewise counsel against permitting modification based on prior practices. The rule precluding an employer and union from modifying a written agreement is derived from section 302 of the LMRA, 29 U.S.C. § 186 (1982), and is designed to "inhibit corrupt practices between employers and unions." *Id; see also Kemmis v. McGoldrick*, 706 F.2d 993, 996 (9th Cir. 1983) (oral agreements between union representatives and employers regarding the meaning of a written trust fund agreement are difficult to prove and judicial recognition of such oral statements invites collusion and controversy to the detriment of the employee beneficiaries). The protection of the beneficiaries is no less necessary when a written trust agreement is modified by a series of oral agreements carried out in practice over a number of years than when the agreement is modified by a single oral agreement.

Meekins's reliance on *Warehousemen's Health and Welfare Fund v. IT Corp.*, 524 F. Supp. 96 (C.D. Cal. 1981), in support of the proposition that bargaining history and the parties' past practices are relevant in determining the intent of the parties must be rejected for several reasons. First, the case is distinguishable because the court found

bargaining history and past practices relevant in construing ambiguous terms of a pension agreement, not in modifying it. More fundamentally, *IT Corp.* is not applicable in light of the subsequent decisions of this court discussed above.

Accordingly, the alleged modification of the pension benefit provisions by Local 1184 based on its past practice of partial enforcement is invalid. The only fraud which may have taken place was fraud in the inducement, which, under *Rozay's Transfer*, is not a legitimate defense to the Funds' claim.[5]

II. *Repudiation of the Agreements*

Meekins also contends that the pension benefit provisions cannot be enforced because it repudiated the agreements. The Short Agreement and Master Agreement comprise a pre-hire agreement under section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f) (1982). Until recently, an employer could unilaterally repudiate a pre-hire agreement unless and until an exclusive bargaining representative was selected by a majority of the employees. *See, e.g., United Bhd. of Carpenters v. Endicott Enters. Inc.*, 806 F.2d 918, 922 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 151 (1987).

In *Mesa Verde Construction v. Northern California District Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (en banc), however, the court adopted the NLRB's decision in *John Deklewa*, 282 N.L.R.B. 184 (1987), *enforced sub nom. International Association of Bridge, Structural &*

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[5]Meekins also appears to argue that the inducement of Charles Meekins to sign the Short Agreement despite the inclusion of Article V, Paragraph C constituted fraud in the execution. The dispute involving Article V, Paragraph C pertains only to Local 12 and not Local 1184. Meekins clearly intended to sign the Short Agreement and be bound by its terms and the terms of the Master Agreement.

Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770 (3d Cir.), *cert. denied*, 109 S. Ct. 222 (1988), as the law of this circuit, holding that a pre-hire collective bargaining agreement "may not be unilaterally repudiated . . . prior to its termination or absent an election among the appropriate bargaining unit's employees to reject the union."[6] *Mesa Verde*, 861 F.2d at 1137. The case was remanded to the original panel to determine whether, under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the decision should be applied retroactively.

The pre-hire agreement in this case had not terminated prior to the period of time for which the Funds seek to collect delinquent pension contributions, and the employees have not elected to reject Local 1184. Meekins's argument that it repudiated the pre-hire agreement therefore fails under *Mesa Verde*.

Meekins argues that *Mesa Verde* should not be applied retroactively. We need not reach this question, however, since we find that Meekins's repudiation argument also fails under the standards that existed prior to *Mesa Verde*.

A. *Methods of Repudiation*

Prior to *Mesa Verde*, there were three distinct methods by which an employer could repudiate a pre-hire agreement:

> (1) by calling for a repudiation election to show that the union does not enjoy majority support; (2) by giving actual notice (written or oral) to the union; or

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[6]An employer may petition for an election under section 9(c) of the LMRA, 29 U.S.C. § 159(c) (1982), and "employees may petition at any time under [sections] 9(c) or 9(e) to either fully certify a union under [section] 9(a) or to decertify their putative union." *Mesa Verde*, 861 F.2d at 1132-33 (footnote omitted).

> (3) by engaging in conduct so overtly inconsistent with contractual obligations that it is sufficient to put the union on notice of the employer's intent to repudiate.

International Bhd. of Elec. Workers, Local Union No. 441 v. KBR Elec., 812 F.2d 495 498 (9th Cir. 1987). Meekins contends that it repudiated the pre-hire agreement (1) by its continued breach of the contract; (2) by written notice of June 26, 1984; and (3) on November 29, 1984, when it filed a petition with the NLRB.[7]

B. *Inconsistent Conduct*

Meekins contends that Local 1184's knowledge that Meekins would not require all employees performing work covered under the short form agreements to become members of Local 1184, nor pay union scale wages or make pension benefit contributions on behalf of these employees constituted "material perpetual breach." Meekins contends that the breach took place from the inception of its relationship with Local 1184.

The Funds characterize Meekins's conduct as nothing more than a mere breach of the contract, which is insufficient to put the union on notice that it intended to repudiate the contract. The Funds maintain that to hold otherwise would elevate every breach of contract to the status of a repudiation.

The Supreme Court has declined to decide what type of conduct may be sufficient to constitute repudiation. *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 270 n.11 (1983). Although this circuit had also refrained from delineating a test for repudiation by conduct, we did state in *Todd*

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[7]We review the district court's conclusions of law de novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

that, "in some circumstances noncompliance can be so bald as to put the union on notice of the employer's intent to repudiate." *Todd v. Jim McNeff, Inc.*, 667 F.2d 800, 804 (9th Cir. 1982), *aff'd*, 461 U.S. 260 (1983). We concluded, however, that McNeff's failure to make contributions to the trust fund as required under the terms of the collective bargaining agreement was insufficient to put the union on notice that McNeff intended to repudiate the contract. *Id.*

In two other cases, however, we have found an employer's refusal to comply with any terms of the pre-hire agreement coupled with a failure to utilize any of the benefits of the agreement sufficient notice of its intent to repudiate. *KBR Elec.*, 812 F.2d at 498; *Endicott*, 806 F.2d at 922-23.

Meekins recognized opposition to full performance of the pre-hire agreement was not sufficient to put Local 1184 on notice that Meekins wished to repudiate the agreement. As discussed in Section I above, Meekins entered into the agreement based on the assumption that it would not be fully enforced by Local 1184. Local 1184 was aware that Meekins's ability partially to preform the agreement was essential to Meekins's decision to sign the agreement. The basis for signing the agreement cannot also be considered to have put the union on notice that Meekins repudiated the agreement.

Admittedly, Meekins, like *Endicott* and *KBR*, did not attempt to utilize the benefits that accrued from signing the pre-hire agreement. With one exception, Meekins never bid on any union jobs nor did it rely on Local 1184 to supply it with subcontractors or workers.[8] Nevertheless, unlike *Endicott* or *KBR*, Meekins did not completely

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[8]Indeed, it is clear from the record that Meekins only signed the November 1, 1983, agreement because of the pressure applied by Bell,

refuse to hire union employees or pay them union wages and contribute to their pension fund. Although, as Meekins contends, it may have "honored the agreement more in the breach," it did partially satisfy the terms of the agreement from the inception of the parties' relationship in 1973.

C. *Repudiation by Written Notice of June 26, 1984*

Meekins's contention that sufficient notice of repudiation was provided by its June 26, 1984, letter repudiating the pre-hire provisions contained in Article V, Paragraph C of the Master Agreement must also be rejected. Article V, Paragraph C required a signatory contractor to enter into a short form agreement with other trade unions. The June 26, 1984, letter does not sufficiently indicate that Meekins intended to repudiate the entire agreement. That Meekins did not intend to repudiate the entire agreement is supported by the fact that Meekins continued to pay its employees belonging to Local 1184 union wages and make pension contributions on their behalf after the June 26, 1984, letter.

D. *Repudiation by Petition*

Finally, we reject Meekins's contention that its filing of the November 29, 1984, election petition was sufficient to notify Local 1184 of its intention to repudiate the contract. It is unclear from the record whether November 30 was included in the audit. This question need not be resolved, however, because Local 1184 cannot be charged with notice of the intent to repudiate less than 24 hours after the petition was filed. There is no evidence in the record that the petition was served on Local 1184 the same time it was filed. Even if the filing of the petition was sufficient to repudiate the agreement therefore, the

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leaving one to question why Meekins signed the agreement in the first place.

alleged repudiation took place after the audit period had ended.

CONCLUSION

Meekins was required under the Short Agreement, Master Agreement, and Declarations to make fringe benefit contributions on behalf of its employees performing work covered under the Short Agreement. The defense of fraud is unavailable to Meekins. Additionally, it did not sufficiently repudiate the pre-hire agreement under the pre-*Mesa Verde* standards.

The judgment of the district court is therefore AFFIRMED.

APPENDIX C

APPENDIX C

STATUTORY PROVISIONS INVOLVED

1. Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 185(c) provides

> "Suits for violation of contracts between an employer and a labor organization presenting employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

2. Section 302(c)(5) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 186(c)(5), provides in pertinent part:

> "The provisions of this section shall not be applicable . . . with respect to money or other thing of value paid to a trust established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which

such payments are to be made is specified in a written agreement with the employer. . ."

3. Section 502(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132 provides in pertinent part:

"A civil action may be brought —

* * *

(3) by a participant, beneficiary, or fiduciary, (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or terms of the plan."

4. Section 306(a) of the Multi-Employer Pension Plan Amendments Act of 1980; 29 U.S.C. § 1145 provides

"Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

5. Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f) provides:

"It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not estab-

lished, maintained, or assisted by any action defined in section 8()a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, that nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: Provided further, that any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

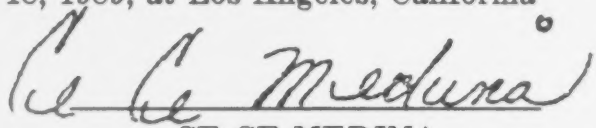
On May 18, 1989, I served the within Petition for A Writ of Certiorari in re: "Meekins, Inc. vs Laborers' Health and Welfare Fund" in the United States Supreme Court, October Term 1988 No. ..., on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Allen K. Tanita
Frank N. Adkins
Galisky & Adkins
3540 Wilshire Boulevard, Suite 512
Los Angeles, CA 90010-2382

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 18, 1989, at Los Angeles, California.



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Supreme Court, U.S.
FILED
JUN 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MEEKINS, INC.,
Petitioner,
vs.
LABORERS' HEALTH AND WELFARE FUND FOR SOUTHERN CALIFORNIA; CONSTRUCTION LABORERS' PENSION TRUST FOR SOUTHERN CALIFORNIA; CONSTRUCTION LABORERS' VACATION TRUST FOR SOUTHERN CALIFORNIA; LABORERS' TRAINING AND RE-TRAINING TRUST FOR SOUTHERN CALIFORNIA; FUND FOR CONSTRUCTION INDUSTRY ADVANCEMENT,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK NELSON ADKINS*
GALISKY & ADKINS
Suite 512
3540 Wilshire Boulevard
Los Angeles, California 90010
(213) 383-3155
Attorneys for Respondents

*Counsel of Record

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

21 pp

QUESTIONS PRESENTED

1. Whether oral modifications made by the employer and union should be effective to alter the express terms of a written collective bargaining agreement in an action brought by third party beneficiary trust funds to enforce the terms of that written agreement pursuant to the Employee Retirement Income Security Act §§ 502 and 515, 29 U.S.C. §§ 1132 and 1145 and § 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

2. Whether an oral modification made by an employer and union, when coupled with partial compliance with the written terms of a pre-hire agreement under § 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(b), is sufficient to repudiate that agreement *ab initio*.

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No. 88-1880

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

MEEKINS, INC.,
Petitioner,
vs.
LABORERS' HEALTH AND WELFARE FUND FOR SOUTHERN CALIFORNIA; CONSTRUCTION LABORERS' PENSION TRUST FOR SOUTHERN CALIFORNIA; CONSTRUCTION LABORERS' VACATION TRUST FOR SOUTHERN CALIFORNIA; LABORERS' TRAINING AND RE-TRAINING TRUST FOR SOUTHERN CALIFORNIA; FUND FOR CONSTRUCTION INDUSTRY ADVANCEMENT,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The memorandum decision of the United States Court of Appeals for the Ninth Circuit (Pet. App. B) was not officially reported. The October 30, 1987 Order of the United States District Court for the Central District of California granting judgment in favor of respondents, together with the findings of facts and conclusions of

law, filed on December 7, 1987 and entered on December 8, 1987 (Pet. App. A), were not officially reported.

JURISDICTION

Respondents accept Petitioner's statement of the Court's jurisdiction.

STATUTES INVOLVED

Respondents accept Petitioner's statement of the statutes involved.

STATEMENT

Petitioner, Meekins, Inc. ("Meekins") was signatory to various collective bargaining agreements with the Laborers' Union ("Union"). Pursuant to those agreements Meekins made monthly contributions to the Respondents, Laborers' Health and Welfare Fund for Southern California, Construction Laborers' Pension Trust for Southern California, Construction Laborers' Vacation Trust for Southern California, Laborers' Training and Re-Training Trust for Southern California, and Fund for Construction Industry Advancement ("Trust Funds"). The Trust Funds are multiemployer plans within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980.

Meekins entered into a series of collective bargaining agreements with the Union. The first of those agreements was signed on October 17, 1973 and was followed by agreements signed on December 12, 1974, March 29, 1978, August 18, 1980 and again on November 1, 1983.

These agreements bound Meekins to the terms of a Master Labor Agreement and various trust agreements which set forth the obligation to pay fringe benefit contributions to the Trust Funds on behalf of individuals who perform covered work.

Meekins fully complied with the fringe benefit contribution obligation created by the written agreements with respect to certain individuals. In 1984 the Trust Funds audited Meekins and discovered that during the period of November, 1983 through November, 1984 individuals, other than those previously reported, were employed and performed covered work, but neither the hours worked were reported to the Trust Funds nor were fringe benefit contributions paid thereon.

The District Court held that "oral modification of such an agreement is legally unavailing against the plaintiff funds. In sum, the selective compliance with the agreement which appears here is not sufficient to put the Union on notice of Defendant's intent that the agreement was terminated." (Pet. App. A, at A-2). Accordingly, judgment was entered in favor of the plaintiff trust funds as set forth in the findings and fact of conclusions of law (Pet. App. A, at A-7).

The Court of Appeals upheld the District Court's findings.

SUMMARY OF ARGUMENT

The District Court and Court of Appeals correctly held that oral representations made by a union, that the obligation to contribute fringe benefit contributions to third party beneficiary trust funds would not be enforced, constituted fraud in the inducement and were invalid and unenforceable. That holding recognizes the necessity of preserving the policy of § 302 of the Labor Management Relations Act (*LMRA*), 29 U.S.C. § 186, requiring trust fund contribution agreements between an employer and a union to be in writing in order to avoid corrupt and collusive practices to the potential detriment of the trust funds' beneficiaries.[1]

The District Court and Court of Appeals also correctly held that the oral representations made between Meekins and the Union were insufficient to repudiate the collective bargaining agreement. Meekins' conduct of partial contract compliance did not rise to the level of "activity overtly and completely inconsistent with contractual obligations" as required by *McNeff v. Todd*, 461 U.S. 260, 271 n.11 (1983).

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[1] *Kaiser Steel Corp. v. Mullins*, 555 U.S. 72 (1982) did not hold that third party beneficiary trust funds are subject to employer defenses based on oral modifications of written agreements. Rather, this Court held that trust funds are subject to defenses of contract illegality.

Likewise, *United Steel Workers v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960) did not involve any issue as to oral modifications of written agreements. That decision upheld the availability of an arbitration clause in a collective bargaining agreement, reasoning that contract interpretation was better left to an arbitrator whose experience with contract negotiations could enable him to resolve contractual disputes.

REASONS FOR DENYING THE WRIT

1. THE NINTH CIRCUIT'S DECISION COMPORTS WITH THE PURPOSE AND POLICIES OF SECTION 302 OF THE LABOR MANAGEMENT RELATIONS ACT AND IS NOT IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF OTHER CIRCUITS.

The Ninth Circuit has uniformally relied on § 302 of the *LMRA* in rejecting oral modifications of written agreements which require contributions to fringe benefit trust funds. For example, the court in *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 775 n.3 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) citing *Waggoner v. Dallaire*, 649 F.2d 1362 (9th Cir. 1981), later appeal, 767 F.2d 589 (9th Cir. 1985), *cert. denied*, 475 U.S. 1064 (1986) stated:

> We held that the express terms of the agreement were to be enforced in favor of the trust fund because oral modification of the employee benefit provisions was forbidden by § 302 of the Labor Management Relations Act, 29 U.S.C. § 186 *id.* at 1366. *See also Operating Engineers Pension Trust v. Giorgi*, No. 85-5823, slip op. at 6-8 (9th Cir. April 28, 1986).
>
> To inhibit corrupt practices between employers and unions, § 302(c)(5) requires that payments from an employer to an employee benefit trust fund be made pursuant to a detailed written agreement. *Maxwell v. Lucky Construction Co. Inc.*, 710 F.2d 1395, 1397-98 (9th Cir. 1983).

See also: *San Pedro Fishermens Welfare Trust Fund Local 33 v. DiBernardo*, 664 F.2d 1344 (9th Cir. 1982) and *Kemmis v. McGoldrick*, 706 F.2d 993 (9th Cir. 1983).

The Ninth Circuit follows the Third Circuit rule regarding oral modifications. In *Lewis v. Seanor*, 382 F.2d 437 (3rd Cir. 1967) the Court distinguished *Lewis v. Mears*, 297 F.2d 101 (3rd Cir. 1961), *cert. denied*, 369 U.S. 873 (1962). The Court in *Lewis v. Seanor* indicated that the *Mears* decision was limited to a situation where parol evidence could be used to show that a written agreement was never fully executed or delivered. The *Seanor* Court held that where there is a valid written agreement any oral understanding suspending or modifying that agreement is invalid under the policies enunciated through § 302(c)(5)(b) of the *LMRA*, *id.*, 443.

Petitioner's suggestion that this situation involves a conflict between §§ 301 and 302 of the *LMRA* based on a characterization of contracts as "real" or "pretensive," is misguided.

Petitioner relies primarily on *Lewis v. Lowry* ("*Lowry I*"), 295 F.2d 197 (4th Cir. 1961), *cert. denied*, 368 U.S. 977 (1962). *Lowry I* involved an appeal from the granting of a summary judgment motion in favor of the plaintiff trust funds. The employer argued that the district court improperly excluded evidence that the union had agreed not to enforce the obligation to the trust fund as set forth in the written agreement. *Lowry I* held that the court must consider evidence in order to characterize the alleged oral modification and written agreement as either "real" or "pretensive."

The Fourth Circuit in *Lewis v. Lowry* ("*Lowry II*"), 322 F.2d 453 (4th Cir. 1963) recognized that *Lowry I* only held that a court must consider evidence that a contractual transaction was, in fact, a sham, *id.*, 455-456. *Lowry II* upheld and reiterated the general rule that parol

evidence was not admissible to alter the written contract, *id.*, 455.

When viewed together, the *Lowry* cases are closely aligned with the "fraud in the inducement" and "fraud in the execution" analysis followed by the Court of Appeals in this action (Pet. App. 13, B-5 to B-9). *Lowry II* characterizes conduct in terms of whether or not the contract was a "sham" or "genuine." *Lowry II* specifically refers to the union agent's misrepresentation as fraud to induce the employer to sign the agreement contrasted with the employer's "no-contract" defense, *id.*, 456. Even the example given by *Lowry I* as to the "April's Fool" contract is a basic example of fraud in the execution.[2]

The Fourth Circuit in the *Lowry* cases was laboring with the problem of characterizing conduct. Ultimately, the resolution in *Lowry II* was to distinguish fraud in the execution from fraud in the inducement. The employer was allowed to present evidence that the agreement never became his contract and was only a "sham," but the Court finally held that such a "contention constituted but an impermissible variance and contradiction of the agreement . . ." *id.*, 322 F.2d at 454.

A fundamental difference exists between the *Lowry* cases and those decided by the Ninth Circuit. The Ninth Circuit has consistently rejected oral modifications based upon an analysis of § 302 of the *LMRA*. Whereas, the *Lowry* cases did not consider the effect of § 302 of the *LMRA* with respect to attempted oral modifications. *Lowry II*, *id.*, 322 F.2d at 456 in fact, concluded that:

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[2] In that example, the court indicated that a contract would not be enforceable where an employer signed a document believing it to represent the actual agreement between the parties, but where the union, as an April Fool's joke, substituted an entirely different and fraudulent document in its place.

> We need not consider whether an oral contract, such as Lowry has asserted, is permissible under the Labor Management Relations Act. (citations omitted). While these statutes do imply that a collective bargaining agreement should be, and require the establishment of a fund to be, in writing, we do not depend upon these provisions to find against the verbal contract now pleaded in defense by Lowry.

Two of the cases cited by Petitioner as supporting its position relate to the use of extrinsic evidence to interpret the meaning of contractual language. (Pet. Brief p. 15, n.6: *Warehousemen's Health and Welfare Fund v. IT Corp.*, 524 F.Supp. 96 (C.D. Cal. 1981); *Brickmasons Pension Trust v. K. Pullen Co.*, 99 Labor Cases, 10730 (CCH) (C.D. Cal. 1983)). Those cases involve issues of contractual interpretation not oral modifications of written agreements. Those Courts held that extrinsic evidence or evidence of past practices can be used to show the meaning of contractual provisions; a situation far different from a union and employer orally agreeing not to enforce certain portions of those agreements.[3]

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[3] In addition, other cases cited by the Petitioner to support the so called "doctrine" of *Lewis v. Lowry ("Lowry I")* are not applicable. *Lewis v. Owens*, 338 F.2d 740 (6th Cir. 1965) held that parol evidence was not admissible to alter the written provisions of a contract in the absence of a showing that the entire transaction was a sham. The court expressly declined to consider the ramifications of § 302 of the *LMRA* within the context of that action. *See also, Wilkes Barre v. Great Northern Press*, 522 F.Supp. 106, 109 (D.C. M.D. Penn 1981) holding that parol evidence was admissible to show that no contract came into existence.

Also, in *Foothandlers Local 425 v. Valmac Industries*, 528 F.2d 217 (8th Cir. 1975) a court was confronted with a situation wherein the employer, completely unknown to the union, substituted different contractual language than that agreed upon during negotiations. In that situation (amounting to fraud in the execution) the agreement was held to be unenforceable.

The availability of an oral modification defense to the employer is not enhanced (as Petitioner suggests) in light of damage, or lack thereof, to the individual beneficiary.[4] As observed in *Maxwell v. Lucky Construction Company*, 710 F.2d 1395, 1398 (9th Cir. 1983):

> Neither the lack of secrecy nor the fairness of the contested oral arrangement are, we believe, grounds on which to excuse the writing requirement of § 302(c)(5). The knowledge and participation of the affected employees are not adequate substitutes for the protection afforded by the writing requirement. Neither an individual employee nor an authorized bargaining representative may, therefore, waive the protections of § 302(c)(5) by accepting oral modification of the employer's written obligation to the trusts. *See J.I. Case Company v. NLRB*, 321 U.S. 332, 339 (1944) (suggesting that even where waiver is advantageous to an individual employee an individual agreement may be superceded by the protective requirements of the Federal Labor Acts).

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[4] The value of *Huge v. Long's Hauling Co. Inc.*, 590 F.2d 457 (3rd Cir. 1978) to Petitioner's argument is uncertain. Judge Adams, in his concurring opinion, specifically indicated that he would not allow any contractual defenses to be interposed against trust funds seeking to enforce the fringe benefit provisions of a written agreement. Judge Adams also distinguished *Lewis v. Lowry ("Lowry I")* since, in that action, the employer's defense was that no contract ever came into existence at all.

The expectation of employees, whether union or not, cannot be used as a viable standard by which to measure the application of *LMRA* § 302. To do so would invite an unworkable and chaotic fringe benefit fund environment. Moreover, Petitioner cannot rely on *Operating Engineers Trust Fund v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984) to support this position. In that case the employer raised the defense of fraud in the execution, that is, he was mislead as to the very nature of the document he executed. Under that situation, the § 302 analysis was not relevant since the written agreement never came into existence in the first instance.

2. THERE IS NO CONFLICT AS TO WHAT CONDUCT CONSTITUTES REPUDIATION OF A PRE-HIRE COLLECTIVE BARGAINING AGREEMENT

There is no tension or conflict between § 302(c)(5) of the *LMRA* and § 8(f) of the *NLRA*.

In essense, the District Court and the Ninth Circuit Court of Appeals recognized that conduct that is partly consistent with and only partly inconsistent with the obligations created by a written collective bargaining agreement is not sufficient to repudiate that agreement.

Although *McNeff v. Todd, supra* did not formulate a conclusive test by which to measure repudiation, this Court did indicate that "engaging in activity overtly and completely inconsistent with contractual obligations" *id.* p. 271, n.11 may be sufficient to accomplish that repudiation.

In every case cited by Petitioner, conduct triggering repudiation was total and unequivocably inconsistent with the obligations created by the written contract. In the instant case, (as to certain individuals) Petitioner

totally complied with various provisions of the written agreements. As observed in *Contractors Health and Welfare Plan v. Harkin Construction Equipment*, 733 F.2d 1321, 1326 (8th Cir. 1984) "a mere breach of contract will not suffice as to establish repudiation." There is no authority supporting Petitioner's position that partial compliance with (or partial breach of) a contract is sufficient to constitute repudiation.

Petitioner's argument that an oral modification between a union or an employer may constitute repudiation is similarly flawed. The requirement of *McNeff v. Todd, supra* requires conduct that is completely inconsistent with the obligations created by the written agreement. Assuming, *arguendo*, that the attempted oral modification was valid, that oral understanding admittedly called for Meekins to honor the written obligations requiring payment of fringe benefit contributions on behalf of, at least, certain employees. By any standard, Meekins' conduct was consistent with that written contractual obligation.

The Petitioner is also attempting to use the concept of repudiation to circumvent the prohibition against oral modifications of written agreements under § 302(c)(5) of the *LMRA*. It is illusory, at best, to simply rename conduct which constitutes an attempted oral modification, thereby validating an otherwise invalid and illegal act.

The Union and Meekins simply did not engage in conduct "completely inconsistent with contractual obligations." Their conduct can only logically be viewed as an attempt to limit the effect of the written agreement. Based on the attempted oral modification, Meekins signed several collective bargaining agreements and continued to partially abide by the written obligation. Accordingly, the District Court and the Ninth Circuit Court of Appeals correctly decided that the

Union and Meekins' attempted oral modification was simply insufficient to effect a repudiation under *McNeff v. Todd, supra.*[5]

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[5] The Ninth Circuit Court of Appeals concluded that since Meekins' conduct was insufficient to constitute a repudiation under *McNeff v. Todd, supra* it was unnecessary to determine the retroactive affect of *Mesa Verde Construction v. Northern California District Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (*en banc*) wherein the court adopted the National Labor Relations Board's decision in *John Deklewa*, 282 NLRB 184 (1987), *enforced sub. nom. International Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), *cert. denied*, 109 S.Ct. 222 (1988). The *Deklewa* rule, as formulated by the National Labor Relations Board disallowed a unilateral repudiation in the absence of an election to accept or reject the union.

Petitioner's suggestion (Petition, pages 20 and 21 footnote 8) that this case supports repudiation under *Deklewa* is in error. *Deklewa* does not provide for repudiation by conduct whether at the inception or during the term of the pre-hire agreement. Moreover, there is no "trend" under § 8(f) to allow unilateral repudiation of pre-hire agreements as demonstrated by the National Labor Relations Board rule enunciated in the *Deklewa* decision and followed by *Mesa Verde Construction, id. See also, R. W. Granger & Sons Inc. v. Local 275*, 686 F.Supp. 22, 28 (D.C. D.Mass 1988) and *IBEW Local 613 v. Fowler Industries Inc.*, 691 F.Supp. 1431, 1436 (N.D. Ga 1988).

CONCLUSION

The Ninth Circuit's decision below represents neither a conflict or tension between federal labor statutes nor does it represent any real conflict between the circuits which have considered the invalidity of oral modifications of written agreements under § 302(c)(5) of the *LMRA*. The Ninth Circuit's decision is also consistent with *McNeff v. Todd, supra* and with every other Court of Appeals' decision that conduct necessary to effectuate a repudiation must be totally and overtly inconsistent with all the provisions of the written collective bargaining agreement. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANK NELSON ADKINS, ESQ.

GALISKY & ADKINS

Attorneys for Respondents
Laborers' Health and Welfare Fund
For Southern California, *et al.*

No. 88-1880

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

MEEKINS, INC.
Petitioner,
vs.
LABORERS' HEALTH AND WELFARE FUND
FOR SOUTHERN CALIFORNIA, et al.,
Respondents.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

DONALD A. JOHNSON, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business addresss is 3550 Wilshire Blvd., Suite 916, Los Angeles, California 90010. On June 15, 1989, I served the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

STANLEY E. TOBIN
HILL, FARRER & BURRILL
35th Floor
445 South Figueroa Street
Los Angeles, California 90071

That affiant makes this service, for FRANK NELSON ADKINS, Counsel of Record, GALISKY & ADKINS, Attorneys for Respondents herein, and that to the best of my knowledge all the persons required to be served in said action have been served.

Donald A. Johnson
DONALD A. JOHNSON

On June 15, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared DONALD A. JOHNSON known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

OFFICIAL SEAL
Theodore Matsue Wilden
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 30, 1990

Theodore M. Wilden
Notary Public in and for
said county and state